PUBLIC PROSECUTOR

v.

DATO' YAP PENG

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[CRIMINAL APPEAL NO. 15 OF 1987]
23 MARCH 1987

CRIMINAL LAW AND PROCEDURE: *Constitutional validity of s. 418A of Criminal Procedure Code - Article 121(1) , 5(1) of Federal Constitution - Case of criminal breach of trust - Transfer from Sessions Court to High Court - Trial Judge held s. 418A to be unconstitutional and void - Inconsistent with Article 121(1) - Therefore certificate for transfer issued by Public Prosecutor invalid and remitted case to Sessions Court for trial - Appeal - whether s. 418A in violation of Article 121(1) and therefore void - Doctrine of prospective overruling.*

This was an appeal by the Public Prosecutor when the High Court trial Judge remitted the case back to the Sessions Court after it was transferred to the High Court by the Public Prosecutor. The Supreme Court had to decide on the issue of the constitutionality of the source of the Public Prosecutor's authority to issue a certificate to transfer and not the *bona fides* of the exercise of his power in doing so. The appeal revolves around the sole and primal issue of the constitutional validity of s. 418A of the Criminal Procedure Code ("the Code") and Article 121(1) of the Federal Constitution. The respondent was charged on 19 December 1986 in the Sessions Court at Kuala Lumpur on two charges of criminal breach of trust. When his case was mentioned again on 29 December 1986 the Deputy Public Prosecutor tendered a certificate under s. 418A of the Code requiring the Case to be transferred to the High Court. The High Court Judge ruled this act of transfer by the Public Prosecutor as unconstitutional and void and remitted the case back to the Sessions Court. The Public Prosecutor appealed to the Supreme Court.

Held:

[1] Section 418A of the Code is in violation of provision of Article 121(1) and therefore unconstitutional and void under the provisions of Article 4(1).

[2] The doctrine of prospective overruling applied so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of their Lordships' judgment in this matter would remain undisturbed and not be affected and the appeal was dismissed on this basis.

[Appeal dismissed.]

Cases referred to:

Public Prosecutor v. Datuk Harun bin Haji Idris & Ors. [1976] 2 MLJ 116
Datuk Haji Harun bin Haji Idris v. Public Prosecutor [1977] 2 MLJ 155
In Re The Special Courts Bill 1978 [1979] AIR AC 478

Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd. [1974] AC 689
In Re Wilson [1975] 1 AC 750
Regina v. Blastland [1986] 1 AC 41
The Queen v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd. [1970] 123 CLR 361
Liyanage & Ors. v. The Queen [1967] AC 259
Public Prosecutor v. Lim Shui Wang & Ors. [1979] 1 MLJ 65
Regina v. Horsham Justices, Ex parte Farquharson & Anor. [1982] 2 WLR 430
Attorney-General v. Brown [1920] 1 KB 773
Yeap Hock Seng v. Minister for Home Affairs, Malaysia & Ors. [1975] 2 MLJ 279
Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia & The Government of Malaysia [1981] 2 MLJ 259
Savrimuthu a/l Sinnapan v. Public Prosecutor [1987] CLJ (Rep) 322
Linkletter v. Walter [1965] 381 US 618
I.C. Golak Nath v. State of Punjab & Anor. [1967] AIR SC 1643
Practice Statement (Judicial Precedent) [1966] 1 WLR 1234
Jones v. Secretary of State for Social Services [1972] AC 994
Choice Investments Ltd. v. Jeromnimon [1981] 2 WLR 80
Defrenne v. Sabena [1981] 1 All ER 122
Huddart, Parker and Co, Proprietary Ltd. v. Moorehead [1908] 8 CLR 330
Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation [1931] AC 275
Re Residential Tenancies Act 123 DLR (Third) 554
R. v. Gallagher [1963] 37 ALJR 40
PP v. Su Liang Yu [1976] 2 MLJ 128
PP v. Fan Yew Tang [1973] 2 MLJ 1
Muskrat v. U.S. [1911] 219 US 246

Legislation referred to:
Constitution of India [Ind], art. 143
Courts of Judicature Act 1964, s. 25(2), Schedule para.12
Criminal Procedure Code, ss. 128, 128(i), 129, 138, 177, 339, 376, 376(i), 417, (1), (2), (3), (3)(a), (3)(b), (4), 418, (i), (ii), 418A, (1) (3),
Dangerous Drugs Act 1952, s. 41, 41A, (1), 41(1), (2)
Federal Constitution, art. 4(1), 5(1), 7(1), 8, (1), 121, (1), 124
Firearms (Increased Penalties) Act 1971, s. 11
Penal Code, s. 409
Subordinate Courts Act 1948, s. 63, 99A

Other sources referred to:
Commentary on Article 124 of the Indian Constitution, 5th Edn., Vol. III

For the appellant - Mohtar Abdullah, (Tan Hock Chuan and Ng Aik Guan with him), DPPs
For the respondent - Kam Woon Wah, (Raja Aziz Addruse and G. Sri Ram with him); M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Eusoffe Abdoolcader SCJ:

This appeal from the judgment of Zakaria Yatim J made on 5 March 1987 revolves around the sole and primal issue of the constitutional validity of s. 418A of the Criminal Procedure Code (FMS Cap. 6) ('the Code') in relation to the provisions of Article 121(1) of the Federal Constitution. To circumscribe reiteration and obviate prolixity, all references in this judgment to sections and articles, unless otherwise specifically indicated, relate to the Code and the Federal Constitution respectively.

The respondent was charged on 19 December 1986 in the Sessions Court at Kuala Lumpur on two charges of criminal breach of trust to which he claimed trial. When his case was mentioned again in the Sessions Court on 29 December 1986 the Deputy Public Prosecutor tendered a certificate issued by the Public Prosecutor under s. 418A requiring the case to be removed to the High Court and this was promptly complied with in view of the peremptory requirement of subsection (3) thereof. The respondent was then formally arraigned in the High Court at Kuala Lumpur on 6 January 1987 when objection was taken on his behalf to the transfer of the case from the Sessions-Court on a challenge mounted against the constitutional validity of s. 418A on the basis that it infringes Article 121(1) and 5(1). Zakaria Yatim J in a reserved decision held s. 418A to be unconstitutional and void in that it is inconsistent with Article 121(1) and that the certificate issued by the Public Prosecutor thereunder was accordingly invalid and of no effect and ordered the case to be remitted to the Sessions Court for trial, and indicated that it was therefore unnecessary to consider the question of the validity of s. 418A in relation to Article 5(1).

As this matter turns substantively on the provisions of s. 418A, it would perhaps be appropriate at this stage to set out its specifications. Subsection (1) of that section stipulates that notwithstanding the provisions of s. 417, the Public Prosecutor may in any particular case triable by a criminal Court subordinate to the High Court issue a certificate requiring the Court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court Subsection (2) declares that the power of the Public Prosecutor under subsection (1) shall be exercised by him personally, and subsection (3) enacts that upon receipt of the certificate, the Court before which the case is triable shall without holding a preliminary inquiry under Chapter XVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable, and thereafter the provisions of subsection (3)(b) and subsection(4) of s. 417 shall apply to such case *mutatis mutandis*. This provision was added to the Code by an amendment effected as from 10 January 1976.

The constitutional validity of s. 418A but only in relation to Article 8(1) was raised before me in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors.* [1976] 2 MLJ 116 (the *Bank Rakyat* case) when I declared that it was unconstitutional and void by virtue of the provisions of Article 4(1) in that it infringed Article 8(1). The Federal Court however in an appeal from a decision in an entirely different case, *Datuk Haji Harun Idris v. Public Prosecutor* [1977] 2 MLJ 155 (the *Hongkong Bank* case), in a judgment delivered by a Court of two Judges, the third member of the Court having died after the hearing but before judgment was delivered without formally expressing any view in the matter, held that s. 418A did not violate the provisions of Article 8(1) and was accordingly valid.

I should perhaps mention that the Federal Court in its judgment in the *Hongkong Bank* case did not refer to or even mention the *Bank Rakyat* case, and, quite apart from this, perhaps the two can be distinguished in that in the *Bank Rakyat* case which involved charges of forgery and criminal breach of trust the sentences imposable in the High Court and the Sessions Court could have been disparate whereas in the *Hongkong Bank* case which involved charges of corruption the sentences upon conviction in the High Court would not have been affected as a result of the transfer. In an advisory opinion under Article 143 of the Constitution of India in *In re the Special Courts Bill* 1978 [1979] AIR SC 478,

Chandrachud CJ (at pp. 508-510) reformulated the principles in relation to the equivalent of our Article 8, and in doing so stated *inter alia* the principle that whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of the provision equivalent to our Article 8 must be determined in each case as it arises, for no general rule applicable to all cases can safely be laid down, and a practical assessment of the operation of the law in the particular circumstances is necessary.

A petition for special leave to appeal against the decision of the Federal Court in the *Hongkong Bank* case was refused by the Privy Council, but as Lord diplock observed in the House of Lords in *Gilbert-Ash (Northern) Ltd. v. Modern engineering (Bristol) Ltd.* [1974] AC 689 (at p. 715): "Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against." This principle was emphatically restated in the House of Lords in *In re Wilson* [1985] 1 AC 750 (at p. 756) and *Regina v. Blastland* [1986] 1 AC 41 (at p. 52). These cases make it clear that there may be a multitude of reasons why leave to appeal may be refused, and one of the reasons in the matter of the *Hongkong Bank* case would obviously seem to be the fact that the petition for special leave to appeal was refused in February 1978 when appeals from the Federal Court in criminal matters had ceased to be heard by the Privy Council as from 1 January 1978.

I did in the course of my judgment in the *Bank Rakyat* case in dealing with s. 418A touch on the matter of Article 121(1) (at p. 119) and Mr. Sri Ram for the respondent candidly admits that he drew inspiration for the attack advanced in the present proceedings against the constitutional validity of s. 418A in relation to Article 121(1) from my digressive observations in this regard in that case-digressive, because there the constitutional question raised and presented for determination was the resultant impact only of Article 8 on the impugned section.

It is now necessary to turn to consider the purport and effect of s. 418A in relation to Article 121(1) provides that subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts, namely, the High Court in Malaya and the High Court in Borneo, and in such inferior Courts as may be provided by federal law. Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of that term, whether inclusive or exclusive, and as Windeyer J observed in the High Court of Australia in *The Queen v. Trade Practices Tribunal: Ex parte Tasmanian Breweries Pty. Ltd.* [1970] 123 CLR 361 (at p. 394): "The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis", and again (at p. 396) that it is "really amorphous". In *Liyanage & Ors. v. The Queen* [1967] AC 259, Lord Pearce in delivering the judgment of the Privy Council, in the course of observing that the Judicial Committee did not find it necessary to attempt the impossible task of tracing where the line is to be drawn between what will and what will not constitute an interference with the judicial power, said (at p. 290):

> Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal.

I have in my judgment in the *Bank Rakyat* case (at pp. 119-120) dealt with the powers of the Attorney General under Article 145(3) and the connotation of his power to "institute" and "conduct" criminal proceedings. My discourse in this regard was approved and adopted by the Federal Court in *Public Prosecutor v. Lim Shui Wang & Ors.* [1979] 1 MLJ 65 (at p. 67). I said there, and I repeat, that the power of the Attorney General under Article 145(3) cannot and does not connote or extend to the regulation of criminal procedure or of the jurisdiction of the Courts or the power or discretion to do so. The power to transfer a case is a judicial power exclusively exercisable by a Court in the manner provided for in ss. 138, 177 and 417 of the Code. The power to transfer is similarly designated as a judicial power and provided for in s. 25 and para. 12 of the Schedule to the Courts of Judicature Act 1964.

Section 418A(1) empowers the Public Prosecutor, who is the Attorney General, by the issue of a certificate to require a subordinate Court to remove to the High Court any particular case triable by and pending before it. It confers on him an untrammelled and uncontrolled power in very wide terms to effect this requirement. In *Regina v. Horsham Justices, Ex parte Farquharson & Anor.* [1982] 2 WLR 430, Ackner LJ (now a Law Lord) said in the English Court of Appeal (at p. 464):

> It has for long been established that from the time a person is charged, even though he has not been committed for trial, his trial is "pending": see *Rex v. Parke* [1903] 2 KB 432, followed in *Reg. v. Duffy, Ex parte Nash* [1960] 2 QB 188, 195.

The power of the Public Prosecutor challenged in the matter before us is the power at any stage of the proceedings to effect the transfer of any particular case pending before a subordinate Court competent to try it to the High Court.

The amplitude of the power conferred by s. 418A on the Public Prosecutor manifests itself in the provisions of s. 418A(3) where upon the receipt of a certificate issued under subsection (1) subordinate Court is obliged without any reservation whatsoever and without more ado to transmit the case to the High Court mentioned in the certificate and cause the accused person to appeal or be brought before such High Court as soon as may be practicable, and thereafter the provisions of subsection (3)(b) and subsection (4) of s. 417 shall apply to such case *mutatis mutandis*. Section 417(3)(b) provides that when the accused is brought before the High Court it shall fix a date for his trial, and by virtue of the provisions of subsection (4) of s. 417 the High Court may then act on the evidence already recorded or partly so recorded and partly recorded by itself, or it may resummon the witnesses and recommence the inquiry or trial, with a proviso to the effect that it would be open to the Public Prosecutor or the accused to apply for the witnesses or any of them to be resummoned and reheard. This would in effect enable the transfer of a case under s. 418A even after all proceedings have been completed but just before a decision is about to be made by the subordinate Court whereby the prosecution could virtually procure a completely new trial by the application of the requisite provisions of s. 417(4).

Section 418A(3) confers a power on the Public Prosecutor but imposes an obligation and a duty on the subordinate Court to obey and comply with his requirement. The subordinate Court has no discretion to act otherwise, and if it can be argued, as encik Mohtar Abdullah, the Deputy Public Prosecutor, seeks to do, that under s. 418A(3) the power to transfer still lies with the subordinate Court, then it would nevertheless remain, in all its stark reality, a duty under the guise of an illusory power of a forensically cosmetic nature and rigged as such. I did in my judgment in the *Bank Rakyat* case say (at p. 121) that s. 418A "is not without a tinge of polite arrogance" In the light of the analysis the Deputy seeks to put on

the provisions of s. 418A(3), I would now go further to say, as I said in Court in the course of the hearing before us, that it only projects and reflects a facade of arrogance clothed in humility.

In my view the provisions of s. 418A are both a legislative and executive intromission into the judicial power of the Federation. It is a legislative incursion to facilitate executive intrusion, and the Deputy in answer to a question I put to him had perforce to agree that in the context of subsection (3) of s. 418A judicial power would amount to "doing what you are told to do". The provisions of s. 418A specifically apply to any particular case triable by and pending before a subordinate Court and the referential application of the provisions of s. 417(3)(b) and (4) by subsection (3) of s. 418A clearly refutes the submission put forward for the Public Prosecutor both before us and in the Court below that his power is not limitless and cannot be exercised if the trial before the subordinate Court has commenced and that he can only exercise his power to issue a certificate under subsection (1) of that section if no witnesses have been called or examined and that therefore the section does not offend Article 121(1). An invalid legislative interference acts on pending judicial proceedings, either directly or indirectly by executive action arrogating to itself functions proper to the Courts, and usurps or obtrudes on the judicial process. If the Public Prosecutor desires to choose the forum of trial of criminal proceedings under his powers under Article 145(3), it is open to him to do so under ss. 138, 177, or 417 of the Code but his power of choice cannot supersede the judicial power exercisable by virtue of the statutory provisions in the Code I have referred to.

I cannot but conclude in the circumstances that there is in fact by the exercise of the power conferred by s. 418A on the Public Prosecutor an incursion into the judicial power of the Federation and that any other view would *ex necessitate rei* result in relegating the provisions of Article 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will. The power of the Public Prosecutor under s. 418A is uncanalized, unconfined and vagrant. The Deputy however assures us that this power will only be exercised reasonably. Now this is exactly what happened in *Attorney-General v. Brown* [1920] 1 KB 773, usually called the *Pyrogallic Acid* Case, in which to complaints about the tremendous breadth of the authority contended for by the Government in the matter of statutory authorisation for the importation of goods, Sir Gordon Hewart, who was the Attorney General at that time, arguing for the Crown, put (at p. 779) what has since become the stock answer of those who see no danger in Executive power being left uncontrolled (and this is quite ironic in view of his subsequent condemnation of similar apologists): "The Government could be relied upon to see that the power was reasonably exercised." Sankey J, however, had no difficulty in holding the Executive action illegal, and he pointed out (at p. 791) that the Crown's argument that the Executive could be trusted begs the question, for the Court could concern itself only with the bare issue of the possession of the claimed power, and not whether it would be reasonably exercised.

When I drew the Deputy's attention to the provisions of subsection (3) of s. 418A and the referential application, as a result, of the provisions of s. 417(4), he said in the first instance that in those circumstances it would be open to an accused person to challenge the exercise of the power by the Public Prosecutor under s. 418A on the ground of *mala fides*. The short answer to this is threefold: First, I cannot see that any question of *mala fides* can conceivably arise when the law specifically provides as it does in subsection (3) of s. 418A for the consequences of a transmission of a case under that section, and the Deputy in answer to

me had *nolens volens* to concede that it would be legally permissible to apply the provisions of s. 417(4) by specific legislative authorization to that end. Second, the challenge by the respondent is to the constitutionality of the source of the Public Prosecutor's authority to issue a certificate and not the *bona fides* of the exercise of his power in doing so. Third, the natural and logical *sequitur* to this contention would be to lay open the door for every accused person affected to challenge the *bona fides* of the Public Prosecutor every time a certificate is issued by him under s. 418A(1). And all this is quite apart from the fact that the most noticeable thing about allegations of bad faith is that they have almost always failed, as the onus of proving *mala fides* is extremely difficult to discharge (*Yeap Hock Seng v. Minister of Home Affairs, Malaysia & Ors.* [1975] 2 MLJ 279 (at p. 284); *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia & The Government of Malaysia* [1981] 2 MLJ 259 (at p. (263)).

When faced with the position put to him of the consequences of the application of subsection (3) of s. 418A the Deputy then suggested that it might be possible to declare only that part of that subsection applying s. 417(4) as bad, in effect invoking the doctrine of severability. The doctrine of severability cannot in my view apply in respect of s. 418A as that section operates as a totality and there is no bad part which can be effectively severed from the good without affecting the whole. Subsection (1) of the section refers to any particular pending case triable by a subordinate Court and subsection (3) provides for the manner of disposal of such cases in the High Court. Any form of severance if it can be effected at all would emasculate and abort the section as a whole and defeat and negate the teleological purpose of the provision which was clearly enacted to give the Public Prosecutor a second string to his bow, so to speak, over and above the provisions of s. 417 as I indicated in my judgment in the *Bank Rakyat* case.

The Deputy relies heavily on the judgment of the Supreme Court in *Savrimuthu a/l Sinnapan v. Public Prosecutor* (Supreme Court Criminal Reference No.2 of 1986; judgment delivered on 1 December 1986: [1987] CLJ (Rep) 322). This ease involved the provisions of s. 41A of the Dangerous Drugs Act 1952 and is wholly distinguishable from the matter before us and has no relevance in relation the provisions of s. 418A. It turned basically on the question of the commencement of the proceedings and the *ratio decidendi* of the decision was that the Public Prosecutor cannot require a case to be tried by the High Court under s. 41A of the Dangerous Drugs Act once the trial has commenced and the trial is said to have commenced when evidence has begun to be adduced. The position in relation to s. 418A is wholly different as it clearly manifests *ex visceribus verborum* the operation of the section at any stage of the proceedings before the subordinate Court right up to even the point where a decision is about to be made. Section 41(2) of the Dangerous Drugs Act provides that notwithstanding the provisions of subsection (1), the High Court shall have jurisdiction to try any case in respect of any offence under that Act if the Public Prosecutor requires any such case to be tried by the High Court. The implementation of the requirement of the Public Prosecutor to this effect is provided for by s. 41A(1) of that Act which states that where any case in respect of any offence under that Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused shall be produced before the appropriate subordinate Court which shall, after the charge has been explained to him, and I pause to observe that there is no provision or requisite for a plea to be taken, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

The formulation of s. 41A of the Dangerous Drugs Act is wholly different from that of s. 418A and does not refer to pending cases triable by the subordinate Court, as once the Public Prosecutor determines that it should be tried by the High Court, the accused is produced before the appropriate subordinate Court which only has to explain the charge to him and without taking a plea transmit the case to the High Court where the trial will then commence. The provisions of s. 41A of the Dangerous Drugs Act accordingly come plumb within the power of the Public Prosecutor under Article 145(3) to institute criminal proceedings. *Savrimuthu* does not therefore affect the position before us in any way whatsoever, and I would add that this equally applies to s. 11 of the Firearms (Increased Penalties) Act 1971 which is identically phrased as s. 41A of the Dangerous Drugs Act.

I would accordingly declare that s. 418A is in violation of the provisions of Article 121(1) and therefore unconstitutional and void under the provisions of Article 4(1). The Deputy submits that any such pronouncement will create chaos as the section in question has been resorted to and trials held in the High Court as a result. The section has indeed been implemented and convictions and acquittals secured as a result over a span of some eleven years in view of the decision in the *Hongkong Bank* case, and it will therefore be necessary in these circumstances to apply the doctrine of prospective overruling in this case.

The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v. Walker* [1965] 381 US 618 (at p. 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *I.C. Golak Nath v. State of Punjab & Anor.* [1967] AIR SC 1643 (at p. 1666-1669). The doctrine-to the effect that when a statute is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the Court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed-can be applied by the Supreme Court as the highest Court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it-to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

In England this doctrine has been recognised by the House of Lords by necessary implication in the *Practice Statement Judicial Precedent* [1966] 1 WLR 1234 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1966. More recently, *in Jones v. Secretary of State for Social Services* [1972] AC 944, two Judges of the House of Lords, Lord Diplock (at p. 1015) and Lord Simon of Glaisdale (at p. 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd. v. Jeromnimon* [1981] 2 WLR 80 Lord Denning MR in his judgment in the English Court of Appeal (at p. 84) accepted the subsistence and application of the doctrine. In *Defrenne v. Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the Court, as an exceptional measure, to declare the law for the future only.

At the conclusion of argument on 19 March 1987, the Court accordingly by a majority (Tun Mohamed Salleh Abas LP and Tan Sri Hashim Yeop Sani SCJ dissenting) declared s. 418A to be unconstitutional and void as being an infringement of the provisions of Article 121(1) and applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis.

All is not lost however, as an application by the Public Prosecutor under s. 417 would still be open and available to him if he chooses to apply thereunder, as I said in the *Bank Rakyat* case when such an application was in fact made and allowed after the transfer effected under s. 418A was vitiated, in which event the High Court will no doubt consider the application within the ambit of that provision and on its merits.

Mohd. Azmi SCJ:

This is an appeal against the decision of Zakaria Yatim J on the constitutionality of s. 418A Criminal Procedure Code. It arose in this way. On 19 December 1986, the respondent appeared in the Sessions Court at Kuala Lumpur and was charged at the instance of the Public Prosecutor on two counts with Criminal Breach of Trust under s. 409 Penal Code. He claimed trial to both the charges and was granted bill in the sum of RM2,000,000 with two sureties. When the case came up for mention ten days later on 29 December Encik Mohtar Deputy Public Prosecutor tendered a certificate under s. 418A Criminal Procedure Code (CPC) requiring the case to be transferred to the Kuala Lumpur High Court for trial. Inspite objections by the respondent, the Sessions Court President removed the case to the High Court, as she was mandatorily obliged to do under s. 418A(3) without holding a preliminary inquiry under s. 138 CPC. After the transfer of the case, the respondent was accordingly charged before Zakaria Yatim J in the High Court on 6 January 1987 on the same two charges. The respondent again objected to the removal of the case on the ground that s. 418A CPC *ultra vires* the Federal Constitution by reason of Article 121(1) and Article 5(1). Relying on the judgment of Abdoolcader J (as he then was) in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors.* [1976] 2 MLJ 116, on the interpretation of the power of the Attorney-General in Article 145(3) to "institute" and "conduct" proceedings, the learned Judge concluded that the power to transfer was a judicial power, and as such s. 418A encroached upon the judicial power of the Federation and therefore was in violation of Article 121(1). That Article provides:

> Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely ... the High Court in Malaya ... and ... the High Court in Borneo ... and in such inferior Courts as may be provided by federal law.

The learned Judge accordingly ruled that s. 418A was unconstitutional on the ground that it was inconsistent with Article 121(1) and was therefore void, without having to consider the provision of Article 5(1). He then ordered the case against the respondent be sent back to the Sessions Court for trial. Hence this appeal by the Public Prosecutor. In his judgment the learned Judge relied on the following statement of Griffith CJ in the Australian case of *Huddart, Parker and Co. Proprietary Ltd. v. Moorehead* [1908] 8 CLR 330, which was cited with approval by the Privy Council in *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* [1931] AC 275 at p. 295 & 296:

> ... I am of opinion that the words `judicial power' as used in s.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision ... is called upon to take action.

The appellant's main argument before this Court is that when Article 121(1) proclaims the judicial power of the Federation shall be vested in the Courts, the term "judicial power" does not include the power to transfer pending cases. Encik Mohtar for the appellant adopts the strict meaning attached to judicial power. As I understand him, judicial power is strictly power to decide disputes, and all other powers such as the power to grant bail, to postpone and adjourn proceedings, and to transfer cases, are merely ancillary and not covered by Article 121. He relies on *Savrimuthu a/l Sinnapan v. PP* Sup. Ct. Criminal Ref. No. 2 of 1986, [1987] CLJ (Rep) 322 a case dealing with s. 41(2) Dangerous Drugs Act 1952 with reference to Article 7(1) of the Federal Constitution, for the proposition that so long as power to transfer in s. 418A is not exercised after the trial has commenced, the impugned section is constitutional. Thus, although he concedes that section allows the Public Prosecutor to issue a certificate for transfer at any stage of the trial before its conclusion, the factual situation in this appeal is such that its exercise is not unconstitutional because the trial has not begun. He also argues that s. 418A is a mere vehicle by which the Public Prosecutor chooses the venue of trial. He refers to the case of *Public Prosecutor v. Lim Shui Wang & Ors.* [1979] 1 MLJ 65 and argues that by implication s. 418A does not contravene Article 121 but is consistent with Article 145(3) which provides:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native Court or a Court-martial.

It is convenient to note at this stage that in *Lim Shui Wang* case, preliminary inquiries were held before the three accused were committed for trial in the High Court, and the point in issue as to whether under the schedule to s. 25(2) Courts of Judicature Act 1964 the High Court had power to send the case back to the subordinate Court after the Attorney-General had properly chosen his trial forum, is wholly irrelevant in this appeal. The learned DPP emphasises that in this instance there is no way for the Public Prosecutor to register the case in High Court straightaway, without holding a preliminary inquiry unless the case is removed to the High Court under s. 417 or 418A which are the only exceptions provided under s. 138 CPC. However, he seems to concede that to the extent of the impugned provision making s. 417(3)(b) and (4) *mutatis mutandis,* it may be unconstitutional. Mr. Sri Ram, Counsel for the respondent persists in his argument that the power to transfer cases is and has always been a judicial power. He invites us to adopt the test applied by the Canadian Supreme Court in the case of *Re Residential Tenancies Act* Vol. 123 DLR (Third) 554 which dealt with the constitutionality of certain provisions of the Act that conferred judicial functions on a body which was not a Court. It was held that the test of constitutionality must be formulated in three stages, and according to Mr. Sri Ram the appellant here has not even satisfied the first step which was dealt with by the Canadian Court in the following statement:

> The jurisprudence since John East leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by Superior, District or County Courts at the time of Confederation. This temporary segregation, or isolation,

of the impugned power is not for the purpose of turning back the clock and restoring *Toronto v. York* as the governing authority, an approach deplored in *Mississauga.* It is rather the first step in a three step process.

If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 Courts, that is the end of the matter. As Rand J noted in *A.E. Dupont et al. v. Inglis et al.* [1958] 14 DLR (2d) 417 at p. 424, [1958] SCR 535 at p. 542: "Judicial power, not of that type (i.e., that exercised by s. 96 Courts at Confederation), such as that exercised by inferior Courts, can be conferred on a Provincial tribunal whatever its primary character." If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 Courts at Confederation, then one must proceed to the second step of the inquiry.

For the proper determination of this apeal, it is essential to consider two things. First, historically the power to transfer pending criminal cases in the subordinate Courts to the High Court for trial has always been vested in and exercisable solely by the Court under ss. 417 and 418 CPC, both before and after Merdeka Day. The position remained so until the Criminal Procedure Code was amended by Parliament vide Act A324 which with effect from 10 January 1976 substituted s. 417 with an amended provision and also introduced the new s. 418A which not only extends the power of transfer of the Public Prosecutor but also gives him unfettered discretion and therefore wider power than the High Court, to remove pending cases from the subordinate Courts. In particular, s. 417 both in its original and substituted from limits the power of the High Court to transfer only in cases where it is satisfied that:

417 (a) a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate thereto; or

(b) some question of law of unusual difficulty is likely to arise; or

(c) a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same; or

(d) an order under this section will tend to the general convenience of the parties or witnesses; or

(e) such an order is expedient for the ends of justice, or is required by any provision of this Code.

Sub-sections 418(i) and (ii) then provide:

418 (i) Every application for the exercise of the power conferred by the last preceding section shall be made by motion which shall, except when the applicant is the Public Prosecutor, be supported by affidavit.

418 (ii) Every such application shall be made before the inquiry into or trial of the offence has been concluded.

Whereas s. 418A gives unfettered and overriding power to the Public Prosecutor by enacting the following:

418A(1) Notwithstanding the provisions of s. 417, the Public Prosecutor may in any particular case triable by a criminal Court subordinate to the High Court issue a certificate requiring the Court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court.

(2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.

(3) Upon receipt of the certificate, the Court before which the case is triable shall without holding a preliminary inquiry under Chapter XVII transmit the case to the High Court mentioned in the certificate and cause the accused person to appear or be brought before such High Court as soon as may be practicable; and thereafter the provisions of subsection (3)(b) and subsection (4) of s. 417 shall apply to such case *mutatis mutandis.*

Now, sub-sections 417(3)(b) and 417(4) are as follows:

417(3)(b) When the accused person appears or is brought before the High Court in accordance with para. (a), it shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

417(4) The Court to which a case is transferred under this section may act on the evidence already recorded in an inquiry or a trial or partly so recorded and partly recorded by itself, or it may resummon the witnesses and recommence the inquiry or trial:

Provided that in any case so transferred the Public Prosecutor or the accused person may, when the Court to which the case is transferred commences its proceedings, apply that the witnesses or any of them be resummoned and re-heard.

Second, under s. 63 of the Subordinate Courts Act 1948 as amended by Act 434 with effect from 1 July 1978, the Sessions Court has jurisdiction to hear all offences other than offences punishable with death. By the same amending Act, s. 64 also provides that a Sessions Court may pass any sentence allowed by law other than a sentence of death. Accordingly, the Sessions Court in this case, is a Court of competent jurisdiction to try the respondent and if he is found guilty, it may pass the maximum sentence allowed by s. 409 Penal Code, which since 31 March 1976 vide Act A327 Pt. II, is twenty years' imprisonment in addition to fine.

In my view, there is no necessity to make a final pronouncement on the meaning of "judicial power" as contained in Article 121(1), for the purpose of determining whether s. 418A violates that Article, for even if I were to adopt the limited and narrow meaning of "judicial power" to merely "adjudications upon disputes as to the rights or obligations arising from the operation of law upon past accounts or conduct" as advanced in Australia in the case of *R. v. Gallagher* [1963] 37 ALJR 40 at p. 43 (an authority not cited by either party) the fact that s. 418A enables a case to be transferred by the Public Prosecutor at any time before the conclusion of the trial is clearly an interference with judicial power to adjudicate disputes.

The power of a Magistrate or President Sessions Court to take cognisance of an offence is governed by s. 128 CPC. When the responded was brought before the Sessions Court on the two charges under s. 409 Penal Code (which offences the President had jurisdiction to try without sanction under s. 129 CPC even if the respondent had appeared before the Court on a complaint of a person other than the Public Prosecutor), the normal legal position was that once the Court had taken cognisance of the offence and was seised with jurisdiction to try the case, the institution of the proceedings by the Public Prosecutor was complete, because not only had the Public Prosecutor successfully invited the Court to take action, but also it was the scheme of the Criminal Procedure Code that trial would follow cognisance and cognisance would be preceded by investigation. Criminal proceedings are in fact not instituted until the Court has taken cognisance of the offence or offences under one or other of the clauses of sub-section (i) of s. 128 CPC (see *Sohoni Criminal Procedure Code,* 18th Edn., Vol. 3, p. 1885). Accordingly, once a Court is seised with jurisdiction by taking cognisance of any offence under s. 128 CPC, a host of judicial powers will flow to enable the Court to proceed to trial and determine the dispute between the parties in accordance with law. In general, the Court taking cognisance of the offence, is the dividing line between

the sphere and domain of the executive and the judiciary, for cognisance by the Court signals the submission of the executive to the jurisdiction of the Court and marks the completion of the exercise of executive power to "institute" the criminal proceedings. From then on, the whole conduct of the proceedings should be within the exclusive judicial power of the Court until its conclusion. The question is, to what extent the provision of Article 145(3) has altered the general rule? That Article refers to "power ... to institute, conduct or discontinue any proceedings for an offence ..." exercisable at the discretion of the Attorney-General, who by virtue of s. 376(i) CPC is also the Public Prosecutor. Since judicial power of the Federation is vested in the Courts, I am of the view that it is manifestly clear the power referred to in Article 145(3) must only relate to the **prosecution** and not the **trial** of criminal proceedings. Any other interpretation would make a mockery of the well established concept of judicial independence to determine disputes. Once the trial has commenced before a Court of competent jurisdiction, the Public Prosecutor must be taken to have exercised his choice of venue, and it is unthinkable that he can be given an unfettered power to change the venue without giving the accused person an opportunity to be heard. When that choice has been exercised and the matter is before the Court, consistent with our adversary system of criminal justice, the status of the Public Prosecutor or any of his officers as a client of the Court, is the same as the Counsel for the accused as far as the Court is concerned when conducting a trial. Once the trial has commenced, any legislation conferring him as a member of the executive, power which goes farther than to "institute, conduct or discontinue" prosecution in any criminal proceedings would be suspected, and if it constitutes an interference or even a risk of an interference with any judicial power of the Court, it must be struck down as being in violation of Article 121 of the Constitution. On Merdeka Day s. 417 recognises the principle that the power to transfer a case at any stage before its conclusion before a Court of competent jurisdiction is a judicial power, and that such power can only be exercised on some defined basis to ensure that a case is a proper one to be transferred from a subordinate Court to the High Court. The adjudication of such matter in compliance with the rule of law and the rule of natural justice must surely be left entirely in the hands of the judiciary.

Section 418A clearly confers judicial power on a body which is not a Court and as such it is an interference of judicial power of the Federation as enshrined in Article 121 of the Constitution. The most objectional aspect of s. 418A is that if in the course of a trial the Public Prosecutor fails to convince the High Court in his application under s. 417 that a case is a proper one to be transferred for any of the reasons allowed for transfer, he is empowered under s. 418A to practically ignore the High Court's decision and achieves the transfer of the case by issuing a certificate signed by him personally under that impugned section requiring the subordinate Court before which the case is pending to remove it to the High Court without assigning any reason and without giving the accused any opportunity to be heard. It is axiomatic that the Court does not act in vain, yet that is the extent of the judicial power given by s. 418A to the executive. The Bill to Act A324 which amended the Criminal Procedure Code, did not state the objects and reasons for introducing the impugned s. 418A. Encik Mohtar has volunteered to furnish them from the Bar by saying that the new section is necessary to enable the Public Prosecutor to choose the High Court as his forum for trial without the necessity to hold a preliminary inquiry under s. 138 CPC. But surely, such enabling provision can be made without violating the provision of Article 121. Indeed Parliament can even legislate to abolish preliminary inquiries altogether as has been done in some common law

jurisdictions. In the circumstances, I am not pursuaded by the argument that s. 418A is merely a vehicle by which the Public Prosecutor can choose his forum. Clearly, judicial power to transfer cases from a subordinate Court of competent jurisdiction as presently provided by s. 418A cannot be conferred to any organ of government other than the judiciary. The submission that the exercise of such power in an unreasonable manner by the Attorney-General has not arisen, is no argument when dealing with the constitutionality of any legislation under which the power is exercised. As correctly pointed out by Mr. Sri Ram for the respondent, the Court here is dealing with the power and not the exercise of it. In this appeal, I am only concerned with two issues -first, whether s. 418A vests any judicial power in the Attorney-General, and second, if so whether such vesting of judicial power violates the Federal Constitution. My answers to both questions are in the positive.

Zakaria Yatim J is correct in his conclusion that s. 418A Criminal Procedure Code violates Article 121 Federal Constitution and it is therefore void by virtue of Article 4(1). I would therefore dismiss this appeal. As already pronounced by the Court at the conclusion of this appeal, I agree that the principle of prospective overruling be applied in this case.

Lee Hun Hoe CJ Borneo:

I have read the judgment of Abdoolcader SCJ, and I agree entirely with the reasons given for dismissing the appeal.

Salleh Abas LP:

The Supreme Court sat in a quorum of five to hear this appeal. At the end of the arguments the Court dismissed the appeal by a majority of three (Tan Sri Datuk Lee Hun Hoe CJ Borneo, and Tan Sri Dato' Mohd. Azmi and Tan Sri Dato' Seri E. Abdoolcader SCJ) and Tan Sri Datuk Hashim Yeop Sani SCJ and I dissenting.

I have had the advantage of reading the leading majority judgment of Tan Sri Dato Seri E. Abdoolcader SCJ and the dissenting judgment of Tan Sri Datuk Hushim Yeop Sani SCJ With respect I find myself entirely in agreement with what has been written by Tan Sri Datuk Hashim yeop Sani SCJ and in support to his judgment I would, with humility, like to add briefly the reason which leads me to depart from the majority view.

This is not the first challenge to the constitutionality of s. 418A of the Criminal Procedure Code. The previous challenge in *Datuk Haji Harun's* case ([1977] 2 MLJ 155) concentrated on the validity of the section *vis-a-vis* the equality and equal protection clause under Article 8 of the Constitution. Since the matter was already decided by the Federal Court, though by a majority of two to one (Tan Sri Ali Hassan FJ having died before writing his judgment), I agree with the view of Zakaria J that the Article 8 issue has been laid to rest, and I do not see any need to reopen it.

This appeal concerns only one issue, i.e., the constitutionality of s. 418A *vis-a-vis* Article 121. This Article vests the judicial power of the Federation in the High Courts and the Subordinate Courts, whilst s. 418A empowers the Public Prosecutor, by means of a certificate issued under his hand personally, to remove any pending case triable by a Subordinate Court to the High Court to be tried there without the necessity of a preliminary inquiry. According to this section, upon receipt of the certificate, the Subordinate Court concerned will transmit the case to the High Court and cause the accused person to appear or to be brought before that Court and no preliminary inquiry needs be held. The High Court will then fix a date for the trial and for that purpose it may act upon the evidence already recorded by the subordinate Court or may start afresh by summoning or recalling witnesses.

The question which we are called upon to decide is whether the provision of s. 418A by giving power to the Public Prosecutor to remove a pending case from a subordinate Court for trial to the High Court encroaches upon the judicial power of these Courts as vested and protected by Article 121. If so, the section is unconstitutional. Otherwise the section is perfectly valid. To this question my answer is in the negative. My view is that the section does not encroach upon the judicial power of the High Court, nor of the Subordinate Court from which the case is transferred.

Although there is no exact definition of the words "judicial power", there is however a general agreement amongst judicial authorities that judicial power must be the power to determine and arbitrate disputes of a legal nature in which parties are concerned with the protection of their legal interests as opposed to any other interest. The power to transfer, transmit or remove a case by itself is meaningless. Admittedly, the Court has power to make an order to transfer cases but this power whether exercisable by a subordinate Court or a High Court is not a power to determine a dispute. Such power could only be regarded as subsidiary or enabling power. On the other hand, the Public Prosecutor has a vital role to play in our system of criminal justice. He has the control and direction of all criminal prosecutions and proceedings (s. 376). In amplification of this power he is entitled to decide whether a person should be charged or not and if so, what Court should try that person. Under the Code all criminal proceedings including the charging must begin in a subordinate Court, even though they relate to a case which the Public Prosecutor requires to be tried by the High Court. A preliminary inquiry must be held before any case could be tried by the High Court. It was with a view to avoiding a double hearing (i.e., preliminary inquiry and actual trial) that s. 418A was enacted to enable the Public Prosecutor to remove any particular pending case from a subordinate Court to the High Court if he deems it necessary that it should be tried by the latter. It was with the same object that s. 417 was repealed and a new one re-enacted at the same time. I will revert to this section in the latter part of this judgment. The power of transfer under s. 418A, in my view, is not a judicial power. It is a power given to the Public Prosecutor to enable him to perform his function effectively as the controller and director of criminal justice having regards to the public interest involved. This power by itself is neutral. Its character depends upon who exercises that power and for what purpose. If it is exercised by the Court it partakes of a judicial nature in the sense that the Court has to listen to both parties before deciding to exercise it and one could therefore say that it is an enabling judicial power. But when it is exercised by the Public Prosecutor it is not a judicial power because he is completely guided by the evidence available before him and consideration of public interest. It is therefore a sort of power enabling or facilitating him to perform his duties as the controller and director of the system of criminal justice in which it is not the right and responsibility of an aggrieved person or the victim of the crime to bring a criminal to book but it is the responsibility of the Public Prosecutor as the custodian of the public interest to do so. I cannot see how this power or even the exercise of it by the Public Prosecutor could be regarded as an encroachment upon the judicial power of the Court. In my view, it is neither a judicial power, nor an encroachment upon that power. We may dislike the provision of s. 418A because the Public Prosecutor may not resort to s. 417. But however unhappy we may be with these two parallel provisions and with the exercise of his power by the Public Prosecutor, there is no reason why we should regard it as unconstitutional. The system of criminally justice in this country imposes a heavy burden on, and places a complete trust in the Public Prosecutor. We, therefore, have to trust him to exercise his power

honestly and sincerely and to have regards to the importance of the public interest involved. If he is lacking in the performance of his duties, according to the established jurisprudence of this country, the remedy does not lie with the Court in declaring the statute giving him such power to be null and void but with the Government or the Parliament to censure and remove him.

The majority view seems to be troubled by the provision of s. 417,which is in effect similar to, though wider than, the impugned section i.e., s. 418A. Both these provisions have the object of transferring or removing (in the case of s. 418A) any pending case in a subordinate Court to the High Court for trial in that Court without the necessity of holding a preliminary inquiry or completing it if one is in progress. In the course of hearing this appeal questions were asked as to the need and necessity of having these two parallel sections standing side by side together. In the case of s. 417 the power of transfer is exercisable by the Court and in the case of s. 418A the power which is to the same effect, though described as the power of removal, is exercisable by the Public Prosecutor. An objection was specifically raised which led the majority to hold s. 418A to be unconstitutional, to the applicability of sub-sections s. (3)(a) and (4) of s. 417 to the case of removal by the Public Prosecutor under s. 418A. The effect of this is that the accused person is required to appear or to be brought before the High Court for the purpose of fixing the date of his trial and in the trial before the High Court the Court is entitled to act upon the evidence already recorded in the subordinate Court or may even decide to hear the evidence afresh by resummoning and recalling the witnesses who have already given their testimonies in the Court below. This implies that the Public Prosecutor is empowered to transfer the case even in the middle of the trial or at the conclusion of the trial just before judgment is given. That being the case, according to the majority view, the Public Prosecutor's power constitutes an encroachment upon the judicial power.

As to the necessity of the provision of s. 417 when there is already s. 418A it is a matter of legislative wisdom and policy. It is not for the Court to declare a law invalid merely because it thinks that the legislature has enacted two parallel provisions giving in effect the same power to two different authorities. In my view the vesting of power of removal of a pending case in a subordinate Court in the Public Prosecutor cannot be regarded as invalid or unconstitutional merely because similar power is also given to the Court. The fact that similar is given to the Court and the fact that the Public Prosecutor is likely to resort to the use of his power rather than that of the Court or because the Court's power will not be resorted to by the Public Prosecutor do not necessarily mean that what is given to the Public Prosecutor is a judicial power or an encroachment upon the judicial power. Thus in my view, no unconstitutionality of s. 418A could be held on those grounds, which are neither here nor there.

As to the applicability of sub-section (3)(a) and sub-section (4) of s. 417, whilst it appears that the Public Prosecutor may exercise his power at any time before the conclusion of the trial in the subordinate Court, this possibility is not a serious objection to the constitutionality of s. 418A. In *Savrimuthu a/l Sinnapan v. Public Prosecutor* (Criminal Reference No. 2 of 1986) the Supreme Court was concerned with the Public Prosecutor's power under s. 41(2) of the Dangerous Drugs Act to issue a certificate requiring a case to be tried by the High Court without being preceded by a preliminary inquiry. In that case the Court rejected the submission of Mr. Karpal Singh (Counsel for the appellant in that case) that once a date of the trial in the subordinate Court has been fixed the Public Prosecutor could no longer exercise the power to issue the required certificate. In rejecting the submission the Court

observed that there is nothing in sub-section (2) of s. 41 which restricts the exercise of the power by the Public Prosecutor in the manner submitted by Counsel. However, recognising that the Public Prosecutor's power is not without any limitation, the Court held that the Public Prosecutor will not be able to issue the required certificate after the trial has begun, i.e., after a witness has given his testimony, because it is no longer proper and reasonable for him to do so. On second thought I may say here, that such exercise would be an encroachment upon the judicial power of the Court.

I now turn back to the present case under appeal. Factually there is no difference between this case and *Savrimuthu's* case. In this case the date of the trial in the subordinate Court has not yet been fixed, nor has any witness given any testimony. All that has taken place was that the respondent was charged before the subordinate Court and upon the production of the Public Prosecutor's certificate the subordinate Court transmitted the case to the High Court and caused the respondent to appear in that Court. The wordings of the statutes are of course different. Section 418A speaks of removal by the Public Prosecutor and transmission by the subordinate Court, whereas s. 41 of the Dangerous Drugs Act speaks of requisition by the Public Prosecutor and transmission by the Court. These differences are, in my view, of no consequence because the effect in both cases is the same in that upon the production of the Public Prosecutor's certificate the subordinate Court will have to transmit the case to and cause the accused to appear before the High Court and on his appearance the latter Court will proceed to fix the date of the trial and then proceed with it.

The mandatory nature of the Public Prosecutor's power was also not a real issue and even if it was, there is no reason for holding the statute to be unconstitutional merely because its effect is mandatory, since there are a number of statutory provisions elsewhere which are of similar effect, and to cite one is s. 66 of Courts of Judicature Act which deals with the Public Prosecutor's application for leave to refer any question of law of public interest. Here the Court has no discretion to refuse leave, if the application for the reference is made by the Public Prosecutor.

If the Public Prosecutor purports to exercise his power under s. 418A after the trial has commenced in the subordinate Court, such exercise, I agree, would be unconstitutional because viewed from the Court's angle it interferes with the Court's function of carrying on with the trial to its conclusion and therefore could be regarded as encroaching upon the judicial power of the Court.

This leads me to the following question, namely would the possibility of the Public Prosecutor exercising his power in this way render the whole s. 418A unconstitutional and invalid? Or is a legislative provision which appears to have given a power wider than that prescribed by the Constitution void in toto? My answer is in the negative. Article 4(1) of the Constitution clearly says that "any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." I emphasise the expression "to the extent of the inconsistency". It, therefore, becomes the Court's responsibility, when dealing with the constitutionality of a piece of legislation, to find any inconsistency and if it so finds to determine the extent of it and to regard only the inconsistent part to be invalid. To declare the whole provisions to be invalid is to go against the provision of Article 4(1). The Constitution presumes the constitutionality of the law. There is no question of throwing away its presumptive validity the moment it is impugned. There is no reason why the Court should proceed on the basis that once a part is unconstitutional, the whole is also unconstitutional. In this respect I find no difficulty in holding that in so far as s. 418A

purports to empower the Public Prosecutor to issue a certificate after the trial has begun only that part, and that part alone, should be held invalid. In other words, the statute is constitutional and valid but only to the extent that the Public Prosecutor's power is exercisable before the trial has started.

Before concluding this judgment I would like to make the following observation. As I have said earlier, the object of s. 418A is to get round the mandatory provision of s. 138 of the Criminal Procedure Code requiring a preliminary inquiry to be held before a case can be tried in the High Court. To be consistent with this objective the old s. 417 was repealed and a new one reenacted alongside with s. 418A. Since then Parliament has made similar provisions circumventing the requirement of preliminary inquiries by means of a Public Prosecutor's certificate in a few other legislations, e.g. s. 41 and 41A of the Dangerous Drugs Act and s. 11 of the Firearms (Increased Penalty) Act 1971. meanwhile preliminary inquiries are also being rendered unnecessary because in the last ten years or so Parliament has increased the jurisdiction of the Magistrates and Sessions Courts which now can try most criminal cases which were hitherto only triable in the High Court, Perhaps the time is now opportune to consider the need to dispense with preliminary inquiries altogether as the institution serves only to lengthen the proceedings and thereby increases the backlogs of cases in the Courts below.

In view of what I have said earlier, I would allow this appeal.

Hashim Yeop Sani SCJ:

The sole question before this Court is whether the provision of s. 418A of the Criminal Procedure Code (CPC) constitutes an intrusion into the judicial power vested in the Courts by Article 121 of the Federal Constitution. There are two things to consider here namely the meaning of judicial power in Article 121 of the Constitution and the true character of s. 418A of the CPC.

First s. 418A. Section 418A of the CPC has been examined with the Courts in this country on a number of occasions. The examination of that section climaxed with the Federal Court decision in *Datuk Hj. Harun bin Hj. Idris v. PP* [1977] 2 MLJ 155 where the first part of the judgment dealt with the constitutionality of s. 418A of the CPC in relation to Article 8 of the Federal Constitution. The Federal Court agreed with my conclusion in *PP v. Su Liang* Yu [1976] 2 MLJ 128 that s. 418A of the CPC is procedural and merely a vehicle for the Attorney-General (or Public Prosecutor) to exercise his powers under Article 145(3) of the Constitution.

The Federal Court also found it clear that part of Parliament's intention in s. 418A was to change the law laid down in *PP v. Fan Yew Teng* [1973] 2 MLJ 1 where the privy Council held that where a case is transferred from a subordinate Court to the High Court, the trial in the High Court must be preceded by a preliminary enquiry under the CPC and one that was not so preceded would be a nullity.

In *PP v. Lim Shui Wang & Ors.* [1979] 1 MLJ 65 the Federal Court dealt with the question whether the Judge of the High Court was right in transferring the case for trial in the Special Sessions Court and the crux of the matter was the power of transfer. Sections 376, 417, 418A of the CPC were examined by the Federal Court and it was held that:

> The power of a Judge of the High Court to transfer a case under s. 25(2) of the Courts of Judicature Act 1964 and Item 12 of its Schedule was subject to the discretion of the Attorney-General under Article 145(3) of the Federal Constitution to choose the forum in which persons

charged under s. 39B(1)(a) of the Dangerous Drugs Ordinance were to be tried; the power conferred under Article 145(3) on the Attorney-General would override the power of the High Court to transfer so that the Judge had no power to transfer such cases as the present on his own motion for trial in a subordinate Court.

For our purpose the first thing to note about s. 418A is that it deals with the power of the Public Prosecutor to issue a certificate **in any particular case triable by a criminal Court subordinate to the High Court.** The subordinate Court concerned upon receipt of the certificate shall **without holding a preliminary enquiry** normally required in such a case under Chapter XVII of the CPC transmit the case to the High Court mentioned in the certificate.

It would seem that the real complaint of the respondent is that by virtue of s. 418A(3) the Magistrate or President "has no discretion" but to transfer the case to the High Court upon receipt of the certificate of the Public Prosecutor. The question is whether this is an intrusion on the judicial power of the Courts.

What is meant by judicial power? No conclusive definition on the concept has been formulated. But the most frequently cited judicial definition was that propounded by the first Chief Justice of the High Court of Australia in 1908 in *Huddart Parker Pty. Ltd. v. Moorehead* [1909] 8 CLR 357 where the learned Chief Justice said:

> The words 'judicial power' as used in s. 71 of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action. [1909] 8 CLR 357

Article 121 of the Constitution vests judicial power of the Federation in the High Courts (of Malaya and Borneo) and in such inferior Courts as may be provided by federal law. The subordinate Courts Act 1948 deals with the subordinate Courts and provides for the powers of such Courts. Section 99A of the Subordinate Courts Act reads as follows:

> 99A. In amplification and not in derogation of the powers conferred by this Act or inherent in any Court, and without prejudice to the generality of any such powers, every Sessions Court and Magistrates' Court shall have the further powers and jurisdiction set out in the Third Schedule.

The words "or inherent in any Court" can be ignored as meaningless since the subordinate Courts are creatures of statute. By virtue of s. 99A the Third Schedule to the Subordinate Courts Act confers additional powers on the subordinate Courts. Paragraph 3(2) of the Third Schedule reads:

> Power, on application or of its own motion, to transfer any proceedings to another Court of co-ordinate jurisdiction.

It can be seen that the Third Schedule deals with powers are ancillary powers for the purpose of the proper carrying out of the civil and criminal jurisdictions of the subordinate Courts.

Also significant is the fact that para. 3(2) of the Third Schedule deals only with the power of transfer to another **Court of co-ordinate jurisdiction** and not to the High Court. Therefore even if this power of transfer is regarded as a judicial power the statute has not conferred the subordinate Courts with any judicial power to transfer cases to the High Court. In short there is no judicial power of the nature complained of by the respondent vested in the subordinate Courts by Article 121 of the Constitution.

The power to transfer cases in respect of the High Courts is also additional power contained in a schedule to the Courts of Judicature Act 1964. It is pertinent to note that under s. 25(2) of the Courts of Judicature Act which confers the additional powers as set out in the Schedule, there is a proviso which reads as follows:

> Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating to the same.

which only means that the legislature may legislate for the exercise of such powers.

What is judicial power depends on the Constitution of each country. The word "judicial power" is not defined in our Constitution. But in the context of Article 121 of the Constitution it would be correct to say that the term has the same meaning as discussed in *Muskrat v. US* [1911] 219 US 246. In the opinion of the US Supreme Court delivered by Mr. Justice Day the following appears at p. 250:

> It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this Court, and, with the aid of appropriate legislation, upon the inferior Courts of the United States. "Judicial power," says Mr. Justice Miller, in his work on the Constitution, "is the power of a Court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. 314.

Basu in his *Commentary,* Vol. III 5th Edn., on Article 124 of the Indian Constitution discussed the meaning of judicial decision and judicial power and at p. 63 he distinguishes question of policy from judicial decision.

Without being pedantic I would say that the basic issue here is really whether the power of transfer is a judicial power. What is and what is not judicial power must be examined in the context of the Constitution and federal law. It seems to me that the power to "transfer" *per se* is not judicial power and in the context of our Constitution and federal law it is a neutral subject. It can be made into judicial power by law and it can also be made into an administrative or executive power by law. Thus in s. 417 of the CPC the power of transfer has been made into a judicial power in that the Court must upon application decide **judicially** on the transfer. In s. 418A of the CPC however the law has left it to the discretion of the Public Prosecutor in cases where in his opinion and in the light of facts known to him alone it would be expedient to have the case removed to the High Court without a preliminary enquiry.

Therefore the only rational conclusion one could arrive at is that the power of transfer at least by the subordinate Courts is not a judicial power as vested pursuant to Article 121 of the Constitution and Parliament may therefore by law provide for the exercise of transfer which it has done in s. 417 and s. 418A of the CPC, s. 41A of the Dangerous Drugs Act 1952 and s. 11 of the Firearms (Increased Penalties) Act 1971.

Much was said about the power of the Public Prosecutor to require the transfer of a case **pending** in the subordinate Courts to the High Courts and that s. 418A(3) of the CPC is said to constitute an intrusion into the judicial power of the Courts. The Public Prosecutor is not an ordinary public officer. His powers are conferred by the Constitution and federal laws to initiate, control and direct criminal prosecutions. The Public Prosecutor has been conferred by the Constitution and federal laws with certain powers for him to play a vital role in the administration of justice. Because of the constitutional position of the Public Prosecutor in our system it is naturally expected of him to exercise these powers with the highest professional integrity and the Courts have to presume that his actions are *bona fide* unless shown to the contrary.

As regards s. 418A(3) leaving no discretion to the Magistrate or President I need only say that s. 418A is not unique. Under s. 339 of the CPC (an original provision) the Public Prosecutor may at any time direct a Magistrate to hold an inquiry under Chapter XXII of Part VIII of the CPC into the cause of, and the circumstances connected with any death and the Magistrate to whom such direction is given **shall** thereupon proceed to hold the enquiry. When such an enquiry has been closed if it appears to the Public Prosecutor that further investigation is necessary, the Public Prosecutor may **direct** the Magistrate to reopen such an inquiry and make such further investigation as he may direct. Again Article 145(3) of the Federal Constitution confers on the Attorney-General the power of *nolle prosequi.* By virtue of that power the Attorney-General may in any criminal prosecution enter a *nolle prosequi* at any time before judgment. Surely it cannot be said that all these powers of the Attorney-General intrude on the judicial powers of the Courts!

Therefore I can come to no other conclusion but that s. 418A of the CPC does not constitute an intrusion into the judicial power of the Courts.

I would accordingly allow the appeal and set aside the order of the Judge.

Also found at [1987] 1 CLJ 550